CRITERIA AND STANDARDS FOR DETERMINING AND VERIFYING INDIGENCY

February 9, 2001

Washington State Office of Public Defense

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WASHINGTON STATE OFFICE OF PUBLIC DEFENSE

Mission

The Washington State Office of Public Defense (OPD) is an independent judicial branch agency. It was created by the Washington Legislature in 1996 and is governed by an advisory committee consisting of legislators, judges, attorneys, and community program administrators. The Washington State Office of Public Defense's mission is to ensure the effective and efficient delivery of appellate indigent services and to implement the constitutional guarantee of counsel.

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EXECUTIVE SUMMARY

Standards have Improved: In 1989, the Washington Indigent Defense Task Force found that many counties had no written standards or guidelines for determining indigency. The ensuing adoption of unified standards in the indigency statute, RCW 10.101, has for the most part successfully established more thorough and consistent indigency standards and guidelines at both the trial and appellate case levels.

To determine indigency, superior courts screen all defendants seeking appointed trial counsel. Generally, most parties charged with felonies who request court appointed attorneys in superior court trial level cases are screened for indigency. Trial level indigency determinations are conducted solely by judges in many counties, while in others judicial time is saved by hiring non-judicial personnel to do the screening. For the most part, basic financial standards established in the indigency statute are followed. Generally, substantial and reasonable efforts are made to determine indigency before state funds are used for court-appointed counsel.

Washington's indigency standards appear to be appropriate. An examination of various states' indigency rates indicates that Washington's rate has adjusted from a relatively high level a decade ago to a level identical to many other states.

Washington social services programs examined for this report appear to be governed by clear and detailed rules regarding establishing and verifying indigency. The standards governing these social services programs seem to be administered consistently. It is appropriate that the receipt of public assistance is a basis for establishing indigency in appointment of counsel determinations.

Overview of Findings

#1: The criteria and standards set out in the indigency statute, RCW 10.101, have successfully established adequate and consistent guidelines for determining indigency status for trial court defendants.

#2: Washington's indigency rate for purposes of appointing publicly funded attorneys is 85-90% of defendants at the superior court trial level and about 88% of appealing defendants, levels typical of many states.

#3:Trial level indigency screening appears to be implemented by appropriate court personnel in the overwhelming majority of counties, but statewide training, unavailable for almost a decade, should be offered to promote uniformity of standards and practices.

#4: Most Washington courts verify questionable information provided by appellants on indigency applications, but have difficulty accessing credit information. All courts should verify information when appropriate and credit report access should be available to the courts.

#5: Provisional counsel is not being appointed consistently in all Washington trial courts. If verification cannot be supplied at the initial trial court proceeding, the court is directed by the indigency statute to appoint provisional counsel until a determination of indigency can be made. Some counties are not appointing provisional counsel in a timely way.

#6: Trial courts usually screen for indigency only once during the proceedings. If the defendant has a history of intermittent employment resulting in above poverty level annual income in the past, the court should rescreen for indigency periodically during the proceedings.

#7: On appeal, judges lack precise standards for determining whether an appellant is indigent, and courts do not have sufficient information to determine indigency in all cases. The appellate indigency court rule should be amended to prescribe a mandatory, standard Motion for Order of Indigency which is made available in all courtrooms so Orders of Indigency can be entered at the time of sentencing, if appropriate.

#8: Some Washington courts inappropriately apply an ad hoc presumption of indigency to appellate defendants who were found indigent at the trial level. At a minimum, brief rescreening should be conducted for each defendant seeking counsel at public expense.

#9: The federal poverty guidelines are a major component of indigency determinations for eligibility for state assistance programs. Verification of an applicant's indigency is a requirement of programs administered by the Department of Social and Health Services. The examined Washington programs appear to be using appropriate standards and verification techniques to assess indigency.

INTRODUCTION

Every person convicted of a crime or juvenile offense, or who was subject to a dependency or parental termination proceeding, has the right to appeal. If a defendant cannot afford the cost of the appeal, the state must pay the expenses of representation in the appellate courts; indigent defendants' right to a publicly funded appeal is guaranteed by the U.S. and Washington Constitutions.[1] Appellate costs in Washington are paid by the Washington State Office of Public Defense (OPD).

OPD was established by the 1996 Washington Legislature to administer state appellate indigent defense services. The agency's primary duties are to implement the constitutional right to counsel and pay appellate costs for indigent defendants who appeal. OPD does not provide direct services to indigent defendants, nor is the agency involved in determinations of indigency.[2]

OPD's enabling statute requires the agency to "recommend criteria and standards for determining and verifying indigency, . . . compile and review the indigency standards used by other state agencies, and periodically submit the compilation and report to the legislature on the appropriateness and consistency of such standards." RCW 2.70.020(4).

In response to the legislative directive, this report examines indigency, financial documentation, and verification procedures in trial and appellate cases. The appropriateness and consistency of the standards now in effect for appellate indigent cases in Washington are discussed and standards and criteria for determining and verifying indigency are recommended. Indigency standards of other Washington state agencies are also examined, as well as indigency standards of other states.

Data Collection. In order to obtain information on how Washington superior courts assess and verify indigency at the appellate and trial level, OPD sent surveys in 1998-9 and 2001 to indigency screeners and evaluators in every Washington county asking them to identify the county entity that investigates appellate indigency applicants and decides whether a party is indigent, the standards and verification methods used, and the percentage of applicants found to be indigent. Surveys were answered and returned by the courts of all 39 Washington counties.

Further information was obtained from a published audit of the King County Office of Public Defense, an agency which screens all applicants for indigent services on the trial level in criminal, juvenile and certain civil cases, and a Pierce County Public Defense Cost Recovery Task Force report prepared by The Spangenberg Group, a national defense research organization. OPD held a symposium for Washington state indigency screeners in May 1999. In addition, public defenders, private attorneys, superior court and appellate court personnel were interviewed in person and by telephone about appellate indigency screening, verification, and determinations.

INDIGENCY DETERMINATIONS AT THE TRIAL LEVEL

Generally, the counties screen people applying for public counsel at the beginning of the trial court proceedings using standards and criteria set forth in the indigency statute.

Processing of Indigency Applications

In 1989, the Legislature enacted the indigency statute (Appendix 1), which requires counties and cities to conduct eligibility screening using a uniform set of indigency standards. Prior to the enactment of this statute, "(m)any counties and cities did not have any routine screening or cost-recovery procedures in place..." *Indigent Defense in Washington State: 1990 Report of the Indigent Defense Task Force,* 1990, at p. 15. After the statute was enacted, local governments made adjustments to implement its more detailed indigency criteria and standards. The 1989 Indigent Defense Task Force predicted that documentation and verification of a defendant's indigency might require more time once Washington adopted indigency standards. "Many courts have reported that resource limitations impose significant impediments to implementation" of RCW 10.101.010. *Indigent Defense* at p.16.

Under present laws, a person who seeks appointed counsel for court proceedings must file an application. Counties are required to ensure that the application for indigency status, the State of Washington Determination of Indigency Report, is filled out before or during the first court appearance [3] (Appendix 2). Trial courts generally make indigency determinations at the defendant's first contact with the court.

Screening Practices. After the statute's adoption, a large number of counties established or expanded screening units in replacement of judicial screening in order to implement the new requirements. Even initially, some counties that replaced judicial screening with staff screening reported they had "recognized savings through increased time-efficiencies and diversion of responsibilities to more appropriate individuals." *Indigent Defense* at p. 22. One example was Kitsap County, which realized a savings of 51.3 court staff days ($7253.66 in wages) after it converted from judicial screening to staff screening in the late 1980s.

Today, Clark, Cowlitz, Grant, Grays Harbor, Island, King, Kitsap, Lewis, Mason, Pierce, San Juan, Skagit, Snohomish, Spokane, Thurston, and Whatcom Counties handle the preliminary application process through employee 'screeners'. In many of the larger counties, these screeners work full-time; in others they have additional roles, such as being probation officers, bail screeners, or public defense employees. Defendants in pretrial detention are interviewed in jail by these employee screeners, who note their answers on the indigency applications. Defendants who are on pretrial release are notified, usually by mail, to contact the screening unit before their first court appearances.[4] A screener takes the defendant's information, fills out the application, and sends the completed application and an indigency recommendation to the judge. In

most of the named counties the completed applications with recommendations as to indigency are forwarded to the court. The judge refers to these screening reports when defendants first appear in court.

Judicial Screenings. In Adams, Asotin, Benton, Chelan, Clallam, Columbia, Douglas, Ferry, Franklin, Garfield, Jefferson, Kittitas, Klickitat, Lincoln, Okanogan, Pacific, Pend Oreille, Skamania, Stevens, Wahkiakum, Walla Walla, and Whitman Counties, the indigency determination process is handled directly by the courts. In general the procedure works as follows: defendants in jail fill out the indigency application themselves. The jail sends the completed applications to the court. Non-incarcerated defendants are directed to the clerks' office or bailiff to pick up applications which they fill out in court. The judge makes follow-up inquiries and determines indigency in court.

Screening Fees and Recoupment of Appointed Counsel Costs. Some courts require defendants to pay an initial application fee from $10 to $25 per application, to be paid at the time they are screened.[5] If a defendant cannot pay the fee in advance, the amount is added to the judgment and sentence if the defendant is convicted. Other courts do not employ promissory notes or periodic payments before trial, but do, in general, order convicted defendants to pay attorney costs as recoupment in the judgment and sentence.[6]

Appointment of Trial Counsel. In some counties, screeners themselves are authorized by the court to make the appointment of counsel. For example, incarcerated defendants who ask for counsel when they first appear in front of the judge in Skagit County are interviewed by the Department of Assigned Counsel's indigency screener when they return to jail. This employee fills out the Determination of Indigency Report and decides whether they are indigent under the indigency statute, which states that "(t)he court or its designee shall determine whether the person is indigent pursuant to the standards set forth in this chapter." If the screener concludes the defendant is indigent, the public defender is appointed.[7]

Provisional Counsel. In cases where a determination of eligibility cannot be made before "the defendant's initial contact with the court or at the earlies time circumstances permit," the indigency statute provides for immediate appointment of a provisional attorney:

> If a determination of eligibility cannot be made before the time when the first services are to be rendered, the court shall appoint an attorney on a provisional basis. If the court subsequently determines that the person receiving the services is ineligible, the court shall notify the person of the termination of services, subject to court-ordered reinstatement.
> RCW 10.101.020(4)

Some counties have interpreted this provision to mean that publicly funded counsel may not be granted until the applicant has verified indigency. However, the

mandatory language of the statute and the intent of the drafting committee[8] indicate that provisional counsel must be appointed by the time of the applicant defendant's first appearance in court if the court has not yet been able to obtain sufficient information to determine indigency. A recent Spokane County Superior Court decision confirmed that "(i)f Respondent (the Spokane County District Court) or its designee is unable to determine the applicant's eligibility or ineligibility for public defender services at the time of application, or the extent of the applicant's ability to contribute to the cost of such services, respondent or its designee shall immediately appoint counsel on a provisional basis…" Knox v. Spokane County District Court, Case No. 00205858-1, Writ of Mandamus and Order, at p. 9 (February 1, 2001.)

Indigent and Able to Contribute. The indigency statute provides that defendants who have some assets but not enough to pay for private counsel may be found "indigent but able to contribute" and ordered by the court to pay a portion of their defense costs. These defendants usually work at low-paying jobs or have a non-liquid property interest of some sort. The statute defines a person who is indigent and able to contribute as one "who, at any stage of a court proceedings, is unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are less than the anticipated cost of counsel but sufficient for the person to pay a portion of that cost." RCW 10.101.010(2). By limiting the definition of 'able to contribute' to persons who have 'available' funds, the statute indicates the drafters' intent that those who are truly indigent shall be appointed constitutionally mandated counsel to represent them in their court proceeding without being required to contribute during the proceeding to appointed counsel's cost.

Promissory Notes: If defendants are found indigent but able to contribute to the cost of their defenses, judges are authorized by the indigency statute to order them to sign promissory notes, usually to pay a certain sum into the court every month during the trial case. Promissory notes generally are based on set amounts for specific types of felonies as established by the county. If a promissory note is not paid in full by the end of the trial court proceedings, the note is discharged but the costs may be rolled over into the judgment and sentence. In those cases, the defendant must continue to pay those costs as a condition of the sentence.

TRIAL LEVEL STANDARDS AND CRITERIA

Financial criteria for determining indigency at the trial court level is defined in the indigency statute. An indigent person is one who is:

(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, general assistance, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, Medicaid, or supplemental security income; or,

(b) Involuntarily committed to a public mental health facility; or

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level; or

(d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.

Financial Standards: Poverty Guidelines are the Main Criteria. The most commonly applied indigency criteria throughout court determinations of indigency are the federal poverty guidelines. The guidelines take into account the number of people in the household and are updated by the federal government each year. Income of household members who contribute to the defendant's living expenses is included. In Washington, defendants whose household incomes are up to 125% of the federal guidelines are defined as indigent.

2000 Poverty Guidelines

Household size	Washington State Income Cut-Offs (at 125%)	
	Annual	Monthly
1	$10,440	$ 870
2	14,065	1,175
3	17,690	1,475
4	21,315	1,780
5	24,940	2,080
6	28,565	2,385
7	32,190	2,685
8	35,815	2,985
each additional	+3,625	+305

Application for Indigency. The indigency application form seeks information regarding the applicant's employment, support obligations, and eligibility for public assistance. If applicants are not public assistance recipients, they must list family

income, contributions from other persons, and non-poverty based assistance, as well as income from stocks, bonds, and real estate. Applicants are required to list in detail monthly expenses and court-imposed obligations and sign the form under penalty of perjury. In addition to requiring the examination of the defendant's income, the indigency statute directs the judge to consider the length and complexity of the proceedings, the usual and customary charges of attorneys in the community for similar matters, and any other circumstances relevant to indigency. Thus, a defendant charged with serious felonies which will require many days of court proceedings is more likely to qualify for appointment of counsel than a misdemeanor defendant with the same income.

Public Assistance Recipients. A person's receipt of public assistance automatically establishes indigency for the appointment of counsel. Public assistance includes temporary assistance for needy families (TANF), general assistance, poverty-related veterans' benefits, food stamps, refugee resettlement benefits, Medicaid, and supplemental security income. Indigency is presumed for those on public assistance because they have been screened by the Department of Social and Health Services or another agency, their financial information has been verified, and they have been found qualified for assistance.

VERIFICATION OF INDIGENCY IN THE TRIAL COURTS

Courts Use Many Verification and Documentation Methods to Investigate Indigency Status. The indigency statute does not require that all financial information be verified, but rather establishes that the defendant's financial information is "subject to verification." The majority of the courts verify all or many indigency applications. Statewide, information is verified in a number of different ways.[9] However, verification requirements that delay the appointment of counsel are impermissible.

In Knox v. Spokane County District Court, Case No. 00205858-1, Writ of Mandamus and Order, (February 1, 2001), the Spokane County Superior Court addressed the extent to which verification is appropriate. The Spokane policy had been that if an out of custody defendant failed to furnish documentation before first appearing in court, provisional counsel would be appointed only through the first hearing. Defendants were advised that 'failing to bring the following documentation "of income, bills, and assets" with you to the Probation Department when you apply for a public defender may delay the appointment of a public defender." Knox, at p.5.

Because the indigency statute "mandates that the appointment of counsel 'on a provisional basis' must be continuous from the time appointment is made until or unless the court subsequently determines that the defendant is eligible", Knox at p. 7, the court found that defendants who were appointed provisional attorneys are entitled to be continuously represented until such time, if ever, that the court determines that the defendant is not indigent.

Verification by Employee Screeners. In counties with screeners, the incarcerated defendants are screened in jail. The screener interviews the defendant and fills out the indigency application, which is forwarded to the court. Verification is often difficult since the screener does not have access to financial information and families frequently cannot be relied on to provide needed information such as tax returns, general assistance receipts, notice of unemployment benefits, or spouses' income. Occasionally family members volunteer positive or negative verification.[10]

Defendants who are not incarcerated are told to contact the screening unit before their initial court appearance and to bring documents such as proof of employment, pay stubs of spouses, bank statements, tax returns, etc., to verify their financial status. When defendants arrive, they are interviewed by one of the staff, who then analyzes their documentation and makes a recommendation as to indigency.

In Applicable Cases, Screeners also Obtain Credit Information from Defendants. Whether or not defendants are incarcerated, screeners generally put the burden on them to produce required credit information. For example, if a defendant owns a house the screener asks if an equity loan can be arranged. If the defendant is unable to obtain a loan, he or she is asked to supply the letter of denial from the credit institution.[11] Credit records are often unavailable to screeners because credit institutions usually do not provide credit history without a release of information. However, Pierce County screeners include a release of information provision in the trial court indigency

application (which provides that "verification may include a credit report") and report that this authorization is accepted by credit institutions.

Documentation is Often Difficult to Obtain. Reviewing verification documents is challenging, since some defendants do not bring the required information with them to the screening appointment and defendants who are screened in jail rarely have access to their financial records. Many counties have adopted a policy decision not to require verification unless screening staff is skeptical of a defendant's claimed lack of resources. If the screener feels that a defendant's statements on the application are questionable, verification is demanded. Screeners may opt to contact the court, prosecutor, or court-appointed counsel with their suspicions.[12] Circumstances which trigger closer scrutiny of the person's financial status include current employment, significant financial support from family members, employment of the spouse, ownership of property, and other factors.

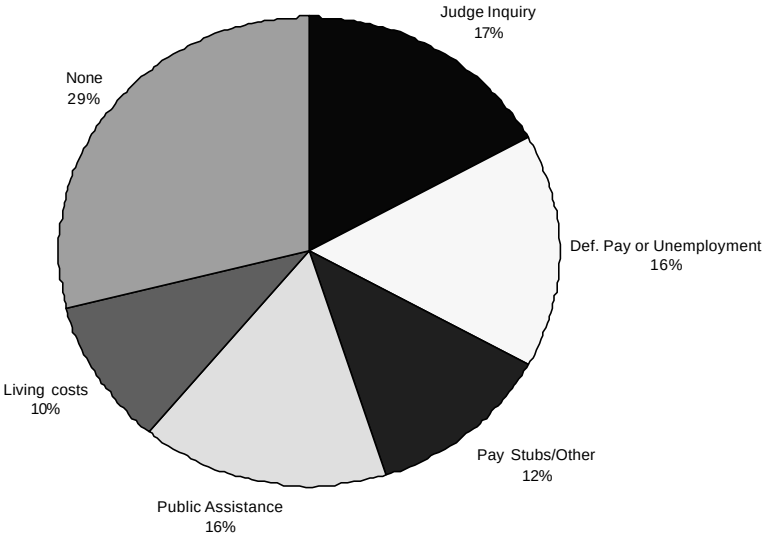
Verifying Intermittent or Seasonal Employment. The indigency statute makes it clear that a defendant's current financial situation determines whether the defendant is eligible for a court appointed attorney. Thus, if a construction worker, fisherman, or other type of intermittent or seasonal worker charged with a crime seeks a court appointed attorney, the worker's eligibility may well depend on whether he or she is currently working. Depending on the type and length of employment, intermittent or seasonal workers' annual incomes can vary from poverty level to comfortable amounts. Courts ordinarily do not rescreen defendants during the proceedings absent affirmative indications that a defendant is no longer indigent.

Intermittent or seasonal employment can be a 'red flag' for screeners, indicating that careful verification of the defendant's assets and bank accounts are called for. In addition, courts can periodically re-screen these defendants to ensure that employment information is updated. Without periodic rescreening, defendants may begin working and fail to volunteer this fact to the court, despite having promised to provide updates in signing the State of Washington Indigency Report Form. In addition the court's cognizance of the defendant's annual earning pattern at the end of the case is important for recoupment purposes.

Verification of Judicially Screened Applications. In counties without staff screeners, judges make direct inquiries of defendants in court regarding their indigency applications. It is rare for judges to personally request documented verification; instead, if a judge concludes that verification is required for an individual application, the judge communicates reservations about a defendant's indigency status to the prosecutor or public defender who then collects financial information and verification. The financial status of some defendants in small counties is common knowledge in the community and may be familiar to the judge and court staff.

In all counties in which verification is routinely or periodically required, the defendant has the burden of providing supporting documents to the screener or the court. Survey respondents indicate courts require various types of verification, as illustrated in the following chart.

TYPES OF VERIFICATION USED BY TRIAL COURTS



TRIAL COURT INDIGENCY RATE

85-90% of all superior court trial level criminal defendants are indigent.

Today, the trial level superior court indigency rate in Washington is 85-90%.[13] In 1990 the Washington Indigent Defense Task Force found that Washington State had "the highest indigency rate (indigent cases per total criminal filings) in the nation..."[14] A comparison of the current estimated Washington superior court trial level indigency rate with those of other states such as Colorado, Arizona, Missouri, Nebraska, Ohio, Georgia, California, and New York reveals that at this time Washington's indigency rate appears to have adjusted to a rate similar to indigency rates found in these states.[15]

LAWS GOVERNING APPELLATE INDIGENCY DETERMINATIONS

Washington law gives trial court judges broad discretion in deciding whether an appellant is indigent.

The appellate indigency Supreme Court rule, Rules of Appellate Procedure 15.2(a), located at Appendix III, governs indigent appellants' right to appeal:

> A party seeking review in the Court of Appeals or the Supreme Court partially or wholly at public expense must move in the trial court for an order of indigency. The motion must be supported by an affidavit setting forth the moving party's total assets; the expenses and liabilities of the party; a statement of the amount, if any, the party can contribute toward the expense of review; (and) a statement of the expenses the party wants waived or provided at public expense . . .

Persons who have been convicted of a crime, lost dependency or termination cases, or are involved in other cases in which the right to counsel is guaranteed initiate appeals by filing notices of appeal in the trial court. Before a defendant is entitled to appointed counsel, indigency must be determined by the superior court judge.[16] The appellate indigency court rule establishes that indigency determinations are initiated when a defendant files a Motion for Order of Indigency and an affidavit describing his or her financial information, which is evaluated by the trial judge. The Motion for Order of Indigency is granted if "the party seeking public funds is unable by reason of poverty to pay for all or some of the expenses of appellate review."

Trial courts have broad discretion in determining whether a defendant filing an appeal is indigent. The appellate indigency court rule does not direct judges to require or consider any specific information regarding a party's assets, expenses, or liabilities. In contrast, the indigency statute, RCW 10.101, offers more specific criteria for determining the indigency of trial court defendants.

As described above, a person whose trial counsel was publicly funded has already undergone an initial indigency evaluation in the trial court. The appellate indigency court rule requires the trial court to reevaluate the defendant's finances at the time the notice of appeal is filed if there is a request for court appointed appellate counsel. Survey answers indicate that, consistent with the appellate indigency court rule almost all the trial courts review indigency at the time of appeal. In most of counties, reevaluation is performed by the trial judge. In a handful of counties, indigency is reassessed by some other entity, such as a screening unit.[17]

APPELLATE INDIGENCY ASSESSMENT IN PRACTICE

Requesting an Indigency Determination for an Appeal

There is no uniform statewide prescribed form for determining financial information on appeal. The appellate indigency court rule requires that Motions for Order of Indigency detail the defendant's income and expenses, but does not specify what income and expenses are needed. Many counties, such as King and Thurston, have developed locally generated form Motions for Order of Indigency for use by their courts.

Generally, the trial attorney prepares the Motion for Order of Indigency with financial information supplied by the defendant.[18] Local protocol dictates the amount of information required for financial affidavits. Some jurisdictions, such as Island County, require a significant amount of information; others, such as Cowlitz and Okanogan counties, ask for a general statement regarding assets and liabilities and the amount the appellant is able to contribute; still others, such as Grant, Kitsap, Lincoln, and Whatcom counties, presume indigency if the appellant qualified for a publicly funded defense at trial.[19]

Indigency information received during the initial trial court proceedings is often incorporated into the Motion. Updated appellate affidavits may include a statement of the appellant's assets, financial liabilities, monthly expenses, and support obligations, but some affidavits fail to provide basic information. Court personnel have noted that determinations of indigency would improve if a standard Motion for Order of Indigency and affidavit were developed.[20]

Use of Previously Acquired Information. Some counties rely on pre-trial screening information. Updated financial information is not obtained except upon a judge's specific request; for example, if a defendant who is asking for appointment of publicly funded appellant counsel paid for private counsel at trial. Courts that have opted not to implement appellate indigency re-screening procedures apparently have decided that it is not cost-effective to re-screen appellants. When the appellant has been in jail throughout the trial court proceedings, and has received a sentence of imprisonment, courts often make a finding on the record such as: "I note that the defendant has been in jail since August 1997 and it is now July 1998 and he is still in jail, so I find him indigent."[21] However, in these counties, as in the others, the defendant's financial situation as reported in the pre-trial financial application generally is reviewed and reevaluated by the judge before an order appointing counsel is entered.

Hearings are not required by the appellate indigency court rule.[22] The Motion for Order of Indigency is filed either at the time of sentencing or after the sentencing hearing. If it is filed at the time of sentencing, judges usually enter the Order of Indigency at the hearing. If it is filed after sentencing, or the concluding trial court hearing, the judge usually reviews the Motion and proposed Order in chambers.

Judicial Review. Whether considered in chambers or at hearings, the counties report that generally judges scrutinize defendants' financial information. Circumstances that trigger close review include defendants who are out of custody, have

a job, own property, were released on a high bond, or were represented by private counsel at trial but now assert indigency. In these cases, defendants are required to provide detailed information showing why they cannot afford private counsel. If the out of custody defendant has no financial resources remaining after paying for minimum living expenses, the trial judge generally finds indigency for purposes of appeal.

Though the courts are not required to evaluate a defendant's financial situation on appeal based on any specific financial criteria, in practice they generally apply the indigency statute's trial level income standards, which incorporate the federal poverty guidelines.[23] Some judges do not directly refer to the guidelines but consider personal and spouses' income and family contributions. Other judges simply determine indigency based on whether the person is able to hire private counsel. Thus, the lack of statewide appellate financial criteria applying to all counties has led to some, but probably not a significant number of, inconsistent determinations of indigency between counties.

DOCUMENTING AND VERIFYING INDIGENCY ON APPEAL

At present, no rule or statute requires the court to verify financial information given by the defendant on appeal. Most courts evaluating indigency for appellate purposes do not require any objective verification. A few counties, like San Juan County or, for out of custody defendants, Pierce County, ask for documentation of the appellant's income and liabilities, usually via pay stubs of the appellant, spouse, or parents (in juvenile cases), or proof of public assistance. Some counties require out-of-custody appellants, but not in-custody appellants, to provide verification. Generally, judges ask defense counsel to provide verification if circumstances indicate that the defendant's indigency status is questionable.

Overwhelming Majority of Appellants are Incarcerated. Screeners report that very few appellants requesting court appointed counsel have any assets or income to be verified. Because almost all are incarcerated and thus unable to work, most have no income. Office of Public Defense records show that for a six month period in 1999, 95% of adults appealing their criminal convictions remained incarcerated in prison or local jails, serving their sentences imposed by the superior courts.

Civil Cases. In some civil cases, the right to counsel is conferred on a statutory or constitutional basis. These include dependencies, parental terminations, and sexual predator cases. Indigent appellants in these cases must file a motion asking the trial court for an Order of Indigency and appointment of counsel.[24]

For appeals involving other types of civil cases, upon the defendant's application, if the trial court finds that he or she is indigent, the defendant's motion for an order of indigency is transmitted to the Supreme Court for consideration pursuant to the appellate indigency court rule, RAP 15.2(c). The Supreme Court determines whether the appeal is taken in good faith, whether there an issue of probable merit is presented, and whether the appellant is entitled to a publicly funded appeal, and orders the trial court to enter an order of indigency and appointment of counsel in appropriate cases.

INDIGENCY RATE IN APPELLATE CASES

About 88% of all criminal and juvenile appeals filed by defendants in 1999 were cases in which the state paid for counsel and the costs of the appeal.

As many survey respondents observed, the overwhelming majority of criminal appellants who request publicly funded attorneys for appeals are indigent. One survey respondent noted that during a one year period, "nobody was denied for an appeal on a re-interview." In fact, almost all defendants who are indigent at trial are indigent on appeal. This most likely results from the fact that generally the trial courts' indigency screening process is conducted carefully and the overwhelming majority of indigent criminal appellants remain incarcerated throughout their appeals. Court records establish that in 2000, slightly over 88% of all criminal and juvenile defendants pursuing appeals as of right were determined to be indigent by court order.

INDIGENCY UNDER STATE AND FEDERAL STANDARDS

Indigency under state assistance programs is for the most part defined by the federal poverty guidelines and documentation and verification of an applicant's indigency is a requirement for most public assistance programs.

To receive assistance through most state welfare and social services programs, either as a case grant or in the form of other benefits, applicants must be indigent. Applicants apply for benefits from several programs administered by the Department of Social and Health Services (DSHS) by submitting one general application. These benefits include cash assistance, food stamps, medical assistance, nursing care, and drug or alcohol treatment and other programs.

As an example of some state and federal benefits income criteria, the chart on the following page shows levels of benefits for a 3-person family (with no elderly members) under some assistance programs funded by the state and federal government. A discussion of benefit programs follows the chart.

Examples of Some Assistance Program Income Criteria and Benefit Levels for a 3-Person Family (no elderly members)

Program	Qualifying Requirements	3 Person Household Income & Benefit Range	Admin-istrator	Funding Source	Comments
Temporary Assistance for Needy Families (TANF)	Based on income and resource standards developed by the state for the TANF program	Income - Benefit $0 - $546 $1091 $10 $1092 & over - No benefit	State	State and Federal	Employable adults must participate in work and/or school.
Medical Assistance	TANF recipients eligible; low-income families eligible but pay varying premiums	Income - Benefit TANF recipients Full coverage $0 to $2314 Children-full coverage Adults-coverage depends on premium paid	State	State with Federal match	Adult premiums for Basic Health Plans vary depending upon health plan selected.
Food Stamps	Maximum income is 130% or less of federal poverty guideline, or receipt of TANF, GA, or SSI. Shelter, childcare, and utility costs may affect benefit levels.	Income - Benefit $0 - Receive $344 in stamps $1503 - $10 in stamps $1534 & over - No benefit	State	Federal (Note: about 2% of the caseload is state funded)	Most commonly distributed public assistance benefit.
School Meal Programs	130% of federal poverty guidelines for free meals, 185% for reduced price meals	Income - Benefit $0 to $1479 - free meals $2105 - lunch .40 bkfst .30	US Dept. of Agricul-ture	Federal	Participation in the TANF and Food Stamps programs automatically qualifies children for free school meals.

Temporary Assistance for Needy Families (TANF). TANF is a DSHS administered cash assistance program for low income families which is supported by both state and federal funds. Recipients qualify based on standards established by the state pursuant to federal requirements under the TANF program. Income eligibility is based on the legislatively set State Payment Standard, which has not changed since 1991.[25] Benefit amounts depend on the available income, assets, and shelter care costs of the family, as well as family size.[26]

Persons wishing to receive TANF must submit detailed applications to their local DSHS office, listing their social security number, income, and the assets of household members. Applicants must also list their expenses, including shelter and utility costs, court ordered support obligations, medical costs and the like. Applicants must disclose any criminal records including convictions for welfare fraud.

Verification. DSHS verifies information submitted by applicants. For example, landlords are contacted to verify shelter costs and other state or federal agencies may be contacted to verify information as well. Applications are signed under penalty of perjury and specifically state the penalties for submitting false information. Applicants who submit false information must repay amounts overpaid and are subject to criminal prosecution and program disqualification.

Medical Assistance. Various types of medical assistance programs exist in Washington. The state provides basic health plans for low-income families. For children, eligibility is based on 200% of the federal poverty guidelines. Assistance may be provided to some but not all family members. Additionally, depending on the type of medical assistance received and the available resources and income of the recipient family, varying amounts of co-payments may be required.[27]

Verification. Applicants must fill out a form prescribed by DSHS, which is signed under penalty of perjury. Recent pay stubs, a letter from the employer, child support awards, and letters verifying other assistance benefits must be submitted with the application. DSHS verifies the information submitted.

Food Stamps. Although the food stamp program is generally part of the Department of Agriculture and is funded by federal dollars, it is administered by DSHS. (Two percent of the caseload is state funded.) The general state application described above is used for applying for food stamps. Income and asset limits apply to the food stamp program and the amount of food stamps received depends upon income and family size. Recipients must have an income equal to or less than 130% of the federal poverty guidelines and qualify under additional standards such as shelter costs.

Verification. Information supplied by applicants about the applicant's income and expenses, shelter and living costs, and court ordered obligations are verified by DSHS. Applicants who wrongly receive food stamps may be disqualified from receiving benefits for a period of time and criminally prosecuted.

School Meal Programs. Local school districts provide free and reduced cost breakfasts and lunches to low income students. These meals are paid for with federal funds which are administered through the Department of Agriculture. The children of

applicant families with an income less than 130% of the federal poverty guidelines are eligible for free lunches and reduced-cost meals are available to children of families with an income equal to or less than 185% of the guidelines.

Verification. The school districts perform annual, random sampling of applications. Applications state that recipients may be required to submit verification.

INDIGENCY STANDARDS USED BY OTHER STATES TO DETERMINE NEED FOR LEGAL REPRESENTATION ON APPEAL

Most states' court-appointed attorney indigency determination standards are similar to Washington's, but many states presume a person to be indigent for appellate purpose.

Because the U.S. Constitution guarantees the right to counsel in appeals involving imprisonment or deprivation of a basic right, each state has some procedure for appointment of appellate counsel to the indigent. States individually decide how to implement the guarantee of counsel and the standards determining whether a person is indigent for purposes of legal representation. Many states' indigency standards are similar to those of Washington. The following is a sampling of several representative states and their standards for determining indigency.

Alaska

Definition of indigency: A "person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance under this chapter." AS 18.85.170(4)

Verification: Applicant must agree to authorize the release of income information to the court, which is verified occasionally.

Indigency reevaluation at time of appeal: If the applicant was found indigent in the trial court, indigency is presumed for appellate purposes. If not, the court reevaluates indigency using trial-level standards.

Delaware

Definition of indigency: Applicants who are incarcerated are automatically presumed to be indigent. The Delaware Code does not provide a definition of indigency. The Delaware Public Defender System, a state agency, screens non-incarcerated defendants.

Indigency reevaluation at time of appeal: Applicants found indigent at the trial level are automatically determined to be indigent for appellate purposes.

Massachusetts

Definition of indigency: An indigent person is one who is receiving public assistance, has a net income which is 125% or less of the current poverty threshold, is in a mental health facility, or pretrial detention, or is serving a sentence in a correctional institution and has no available funds.

Verification: A probation officer or other judicial official takes the financial information from the applicant, verifies it, and makes a recommendation to the court as to indigency.[28]

Indigency reevaluation at time of appeal: Applicants determined to be indigent at trial are presumed indigent on appeal.

Colorado

Definition of indigency: A person who has a household gross income of 125% or less of the minimum level of the current federal poverty guidelines.

Verification: Practices vary among the counties. Pay stubs and proof of general assistance proof are often required at the trial level.

Indigency reevaluation at time of appeal: Indigency is presumed if the defendant was indigent at trial. If the defendant retained private counsel for trial, an appellate indigency application must be filed to obtain appellate counsel at public expense.

CONCLUSION

In 1989, the Washington Indigent Defense Task Force found that the majority of counties had no written standards or guidelines for determining indigency. The ensuing adoption of unified standards in the indigency statute, RCW 10.01, has for the most part successfully established more thorough and consistent indigency determinations at both the superior court and appellate level.

At present, in the overwhelming majority of counties, all parties charged with felonies who request court appointed attorneys in superior court trial level cases because they cannot afford to hire counsel are screened for indigency. Trial level indigency determinations are conducted solely by judges in many counties; in others, judicial time is saved by hiring non-judicial personnel to do the screening. Some counties with screening units verify many indigency applications; other counties with less available resources only verify selected applications, such as those which show income or possible assets.

Generally, the basic financial standards established in the indigency statute are followed, though some counties still use their own forms rather than the state form. Screening is mandatory under the indigency statute but should not become so complicated that it is not cost effective. Rigid verification requirements are impermissible if they impede the defendant's right to timely appointment of counsel.

In general, reasonable efforts are made within the resources available in the various counties to determine indigency before public funds are used for court-appointed counsel. After the indigency statute was adopted in 1989, education on its application was offered to the courts; currently, implementation of periodic statewide updates on indigency determination issues which have been requested by county screeners would make screening techniques more efficient and consistent statewide.

Not all defendants who request appointed counsel for their appeals are re-screened. Appellate level indigency determinations are governed by the appellate indigency court rule, which does not establish specific standards. It is generally less detailed than superior court level screening. This appears to be a reflection of the fact that all indigent defendants were screened before their trials, and the overwhelming majority remain continuously incarcerated during their appeals. Some courts apply an ad hoc presumption of indigency to these appellants, but since parties' financial circumstances can change even if they are incarcerated, it is important for superior courts to conduct a review of each party's assets, expenses, and liabilities pursuant to the appellate indigency court rule before authorizing the appointment of appellate counsel.

An examination of various states' indigency levels indicates that Washington indigency determinations for court-appointed counsel have adjusted from a relatively high level a decade ago to a level identical to many other states.

The Washington social services programs examined appear to be governed by clear and detailed indigency rules. Standards governing these social services programs seem to be appropriate, and the receipt of public assistance receipt should continue to serve as a basis for establishing indigency in appointment of counsel determinations.

FINDINGS AND RECOMMENDATIONS

#1: The criteria and standards set out in the indigency statute have successfully established adequate and consistent indigency standards and guidelines for determining the indigency status of trial-level defendants.

The current standards have vastly improved indigency determinations. Prior to the 1989 enactment of the indigency statute, RCW 10.101, the Washington Indigent Defense Task Force found there was no routine screening to assess indigency in many counties.

#2: Washington's indigency rate for purposes of court-appointed attorneys is about 85-90% of defendants at the superior court trial level and at least 88% of appealing defendants.

In 1989, the Washington Indigent Defense Task Force found that Washington's indigency rate for court-appointed counsel was among the highest in the nation. In the intervening years, the indigency statute's screening standards have been implemented and Washington's indigency rate is now about the same as that found in many other states.

#3: Trial level indigency screening appears to be implemented by appropriate employees and court personnel in the overwhelming majority of counties, but no statewide training has been available for almost a decade.

Different screening entities are collecting information and verifying indigency in almost all Washington counties; however, in every county indigency determinations are being handled by an appropriate entity. The majority of these entities have not been trained in screening techniques and indigency standards since shortly after the passage of the indigency statute in 1989.

Recommendation: the state should provide screeners and indigency evaluators with updated training regarding indigency standards and screening techniques.

#4: Most Washington courts verify questionable information provided by applicants on indigency applications, but have difficulty accessing credit information.

The indigency statute establishes that trial-level indigency determination applications are 'subject to verification.' The majority of courts verify all or some incigency applications, but have difficulty accessing defendant's credit records.

The appellate indigency determination court rule does not require trial courts to verify the sworn information asserted by defendants on their indigency affidavits. Often, screeners and courts do not verify any information, or rely only on the appellant's answers to questions.

Although it is not cost effective to verify each application, if an appellant has a job, normally works as an intermittent or seasonal worker, receives public assistance, retained private counsel at trial, or the application raises other questions, the information should be verified. This is the practice in a number of counties.

Recommendation: Applications should be verified if the application indicates there is a question of indigency. Screeners should have access to appellant applicants' credit reports from credit agencies and various types of financial records in order to effectively verify applications. An appropriate release of information should be added to the trial-level Determination of Indigency Report and the appellate Motion for Order of Indigency form.

#5: Provisional counsel is not being appointed in all Washington trial courts.

The defendant appropriately has the burden of providing verification at the time of screening. If verification cannot be provided at the initial trial court proceeding, the court is directed by the indigency statute to appoint provisional counsel until a determination of indigency can be made. Some counties are not appointing provisional counsel until screeners can make an indigency determination.

Recommendation: if a determination of indigency cannot be completed before or at the initial court proceedings, the court are required to appoint provisional counsel until the indigency determination is made.

#6: Many courts do not rescreen intermittently or seasonally employed defendants whose past annual earnings were above the poverty level.

Past intermittent or seasonal employment resulting in above poverty level annual income should serve as a 'red flag' that the defendant's income may improve substantially if the defendant begins working during the legal proceedings. Such cases call for periodic rescreening in order to determine whether the defendant has become ineligible for a court appointed attorney or should be contributing to the cost of the attorney, and for purposes of recoupment at the end of the case.

Recommendation: If an intermittently employed defendant whose past annual income was above the poverty level, courts should periodically rescreen the defendant if the legal proceedings last for a significant period of time.

#7: For appeals, judges lack precise standards for determining whether an appellant is indigent, and courts do not have sufficient information to determine appellate indigency in all cases.

At present, trial judges who are deciding whether an appellant is indigent for purposes of appeal do not have specific financial criteria to follow. This has led to different approaches for determining indigency and can lead to inconsistent results in different counties. In contrast, the trial level indigency standards are more easily applied to determine indigency on appeal. The lack of requirements for appellate indigency determinations means that appellants themselves control the amount and type of indigency information provided to the court in many counties.

Recommendation: The appellate indigency court rule, RAP 15.2, should be amended to prescribe a mandatory, standard Motion for Order of Indigency which includes a financial certification by the indigent appellant. The standard Motion and Order should be made available in all courtrooms so the Order of Indigency can be entered at the time of sentencing, if appropriate.

#8: Some Washington courts apply an ad hoc presumption of indigency to appellate defendants who were found indigent at the trial level.

Some Washington courts do not reassess indigency if the appellant was found indigent at the trial level. This practice is followed in other states but Washington's appellate indigency court rule requires that the court revaluatee the appellant's indigency status before publicly-funded counsel can be appointed. This is warranted because the defendant's financial circumstances can change and it is important to periodically review the financial status of persons receiving publicly-funded counsel or other services.

Recommendation: At a minimum, brief rescreening should be conducted for each defendant seeking counsel at public expense. Appellants should be required to complete financial information affidavits for the standard Motion and Order for Indigency. More extensive screening should be conducted if warranted by the facts.

#9: Indigency under state assistance programs is for the most part defined by the federal poverty guidelines. Verification of an applicant's indigency is a requirement of programs administered by the Department of Social and Health Services. The examined state and federal programs appear to be using appropriate standards and verification techniques to assess indigency.

ENDNOTES

[1] Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 22 of the Washington Constitution.

[2] Washington indigent appellate services are provided by private attorneys located in all 39 counties or non-profit legal organizations. Approximately 1.6% of Washington attorneys in active practice provide state appellate indigent services.

[3] This form is located at Appendix 2. In practice, some counties, such as Pierce and Grays Harbor, have developed local forms. In Grays Harbor, a court clerk is present at every court hearing. Defendants who request counsel are referred to the clerk who helps them fill out affidavits of indigency and a local Request for Attorney form. These forms are given to the judge, who makes indigency determinations and appointments.

[4] Screeners report that the cooperation level of defendants is good if they have clear instructions regarding when to come to the screening office, where the office is located and what information to bring. Interview with screening personnel, Island County Public Defense Department, August 1999.

[5] King, Pierce, San Juan and Skagit counties charge initial application fees.

[6] As of January 2001, Adams, Asotin, Benton, Chelan, Clallam, Clark, Columbia, Cowlitz, Douglas, Franklin, Garfield, Grant, Grays Harbor, Island, Jefferson, Kittitas, Klickitat, Lewis, Lincoln, Mason, Okanogan, Pacific, Pierce, San Juan, Skamania, Snohomish, Spokane, Thurston, Whatcom, Wahkiakum, Walla Walla, Whitman, and Yakima courts order recoupment in some or all cases.

[7] Island County is an example.

[8] Interview with Hon. Philip J. Thompson (ret.), former chair of the Washington State Indigent Defense Task Force, September 2000.

[9] Many jurisdictions routinely verify selected types of information because the cost of verifying every statement would exceed potential savings. One judge noted, "I doubt that the expense of more sophisticated screening would be recouped by avoiding appointment of counsel on a handful of cases." OPD Survey, 1999.

[10] Screeners note it is not unusual for ex-spouses or neighbors of defendants to call them to complain about the appointment of public counsel to the defendant or even bring in records to support their allegations.

[11] One screener reports that defendants with some assets can call their banks while being screened, then turn the phone over to the screener who can verify financial information with the loan officer on the spot. 1999 Interview with Roxanne Krieg, Pierce County Pre-Trial Services.

[12] King County has prosecuted a number of defendants for falsifying information on the State of Washington Determination of Indigency Report application.

[13] The Washington rate is based on the 1998-1999 and 2001 OPD indigency surveys, as the rate is not presently readily available from the Judicial Information System due to variations in reporting. Interview with Jean Du, OAC's Research Manager, December 2000. Nationally, there has been no study of indigency rates for over 15 years. Many court administrators and defender organizations in other states do not collect statistics on indigency rates. Interview with The Spangenberg Group, West Newton, Massachusetts, September 2000.

[14] *Indigent Defense in Washington State: 1990 Report of the Indigent Defense Task Force*, June 1990, at page 1.

[15] Officials with the following organizations were consulted regarding the percentage of people applying for public defenders who are found indigent: the Colorado Public Defender System (80%, though there is a widespread feeling that estimate is too low), the Maricopa County, Arizona Public Defender's Office (92%, based on a study on indigency performed by the agency), the Missouri Public Defender System (over 90%), the Douglas County (Omaha), Nebraska Public Defender Office (over 90%), the Ohio Public Defender System (claims 34-67%, but notes "virtually everyone gets a public defender"), the Georgia Indigent Defense Council (over 90%), the Office of the Marin County (California) Public Defender (95-99%), the North Dakota Legal Counsel for Indigents Commission (80% or "most if not all who apply get a defender"), the New York State Defenders Association, Inc., (90%; published in Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center (August 1994).

[16] Trial court judges are involved in indigency determinations at both the trial and appellate level. Appellate court judges generally are not involved in determinations of indigency.

[17] For example, in Clark, Island, and San Juan Counties, indigency screeners determine indigency for appellate purposes.

[18] Usually the trial defense attorney prepares the Motion for Order of Indigency, but if the trial attorney was unable to do so, the court may ask an appellate attorney or local public defender to file the necessary documents.

[19] If indigency is presumed for appellate purposes, the trial attorney includes a statement in the Motion for Order of Indigency to the effect that indigency was previously established and there has been no change in the defendant's financial circumstances.

[20] Interview with Maria Underwood, Senior Case Manager at the Court of Appeals, Division II, who notes that presently the amount of information included in affidavits is not consistent and some affidavits and orders present incorrect information.

[21] Interview with private attorney John Farra, Grays Harbor County.

[22] Even though hearings are not required by the appellate indigency court rule, many judges ask defense counsel to provide information in addition to what is included in the motion, usually because the judge thinks there is a question as to whether the appellant is indigent. The practice in Pierce County is for the prosecutor to approve the defendant's proposed Order of Indigency, which may cause delay if the Order of Indigency is not prepared by the time of sentencing. It has been suggested that standard Motions for Order of Indigency and Orders of Indigency forms should be made available in every trial courtroom for use during the final trial court hearing so questions about the defendant's indigency can be resolved expeditiously.

[23] See chart on page 7.

[24] RAP 15.2(b)(2) and In re Grove, 127 Wash.2d 221, 897 P.2d 1252 (1995).

[25] Correspondence with DSHS, January 2001.

[26] TANF recipients, except in limited cases such as families in which the parents have infants less than four months old, are domestic violence victims, or have other special circumstances, generally must work. If the parents are teens still in high school or recipients in need of services to become employable, they must be preparing for work in school, training, or subsidized employment. Additionally, as a condition to receiving case assistance, TANF recipients must assign all support rights, including child support.

[27] As a condition to receiving medical assistance, applicants must assign their rights to medical care support and insurance payments to pay for covered medical services while receiving medical assistance. DSHS seeks to recover all costs of long term medical care for recipients who are age 55 or older from their estates.

[28] Rule 3:10, Section 8 of the Supreme Judicial Court Rules of the Supreme Court of Massachusetts.